IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24/02/2003

CORAM

THE HONOURABLE MR.JUSTICE A.S.VENKATACHALAMOORTHY
AND
THE HONOURABLE MR.JUSTICE M.CHOCKALINGAM

A.S.No.391 of 1988

Bhajanlal H. Raheja .. Appellant

-Vs-

1. P.Natarajan (died)
2. N.Shunmuga Raj
(2nd respondent brought on
record as proposed L.R. of
the deceased 1st respondent
vide order of Court dated
19.12.2000 in CMP 7180 to
7182/98) .. Respondents

This appeal suit is preferred under S.96 of The Code of Civil Procedure against the judgment and decree of the learned II Additional Subordinate Judge, Coimbatore (Principal Subordinate Judge, Coimbatore in charge) dated 6.4.1988 and made in O.S.No.230 of 1986.

!For Appellant : Mr.S.M.Hameed Mohideen

^For Respondents : Mr.M.S.Krishnan

:JUDGMENT

M.CHOCKALINGAM, J.
The plaintiff in a suit for recovery of money on a mortgage is the appellant herein.
2. This appeal suit has arisen from the judgment of the learned II Additional Subordinate Judge dismissing the suit filed by the appellant/plaintiff.
3. The case of the appellant/plaintiff is as follows:
The defendant for the purpose of his medicinal oil business approached the plaintiff for financial assistance and handed over his documents of title deeds on 30.6.1982 for the purpose of security. Apart from that, the defendant executed a promissory note on 1.7.1982 for Rs.15,000/-. On that day evening, he also executed a memorandum of deposit of title deeds confirming the documents already handed over on 30 .6.1982 to the plaintiff. The defendant also produced two encumbrance certificates that day. The defendant

executed another promissory note for Rs.15,000/- on 8.7.1982. The agreed rate of interest under two promissory notes is 3% per month. Thus, the defendant has created an equitable mortgage over his house property at Coimbatore. The defendant is liable to pay Rs.70,395/-. Despite demands, the defendant did not pay the amount. A notice was issued to him on 2.1.1984. Again the same notice was sent on 7.3.1986. The defendant sent a reply on 15.3.1986, but has not repaid the amount. Hence, this suit.

4. The defendant filed a written statement with the following averments:

He approached a broker by name Kandasamy for a finance of Rs.30,000/-. The said broker arranged the suit loan from the plaintiff. Accordingly, the loan of Rs.30,000/- was advanced to him in two instalments viz. Rs.15,000/- on 1.7.82 and Rs.15,000/- on 8.7.1982. The loan comes under the provisions of the Tamil Nadu Money Lender's Act. While receiving the promissory notes, the plaintiff obtained his signatures in documents, and now only he understands that there is equitable mortgage by deposit of title deeds. There was no mortgage, and the mortgage set up by the plaintiff is false and fraudulent. From 8.9.19 82 to 1.1.1984, the defendant has paid amounts totalling to Rs.44,115 /- to the plaintiff. The rate of interest claimed by the plaintiff is usurious. For the notice sent by the plaintiff, he caused a reply dated 29.6.1983. The suit loan was discharged in full as on 1.1.1984 . The promissory notes dated 1.7.1982 and 8.7.1982 are barred by limitation. Hence, the suit may be dismissed with costs.

5. The trial Court framed as many as five issues and tried the suit. The plaintiff has examined himself as P.W.1 and has marked Exs.A1 to A20. On the side of the defendant, D.Ws.1 to 5 were examined, and Exs.B1 to B18 were marked. The learned II Additional Subordinate Judge after hearing both sides and considering the evidence both oral and documentary dismissed the suit. Being aggrieved by the judgment of the lower Court, the plaintiff has brought forth this appeal.

6. The appellant filed the civil action for recovery of a sum of Rs.70,395/- with subsequent interest on Rs.30,000/- alleging that the first respondent/defendant executed an equitable mortgage over the plaint Schedule house property on 1.7.1982 pursuant to the deposit of title deeds on 30.6.1982; and that in default of payment of the said amount within the stipulated time, the plaintiff should be permitted to bring the mortgaged property for sale to realise the decree amount. The defence put forth by the first respondent/defendant was twofold that there was no mortgage as put forth by the appellant/plaintiff, and the same was false and fraudulent, but the defendant has put forth the plea of discharge of the entire debts incurred by him. Agreeing with the defence set up by the defendant, the lower Court has dismissed the suit.

7. In order to substantiate his claim, the plaintiff has examined himself as P.W.1. He has categorically deposed that the defendant executed Exs.A1 and A2 promissory notes on 1.7.1982 and 8.7.1982 respectively in consideration of Rs.15,000/- each borrowed by him; and that on the evening of the same day, he executed Ex.A3 memorandum of deposit of title deeds confirming the documents already handed over to the plaintiff on the previous day viz. 30.6.1982 as security for the amount borrowed. At the outset, it remains to be stated that the defendant has not disputed the borrowal of Rs.15,000/- on 1.7.1982 and Rs.15 ,000/- on 8.7.1982 made by him and has also

admitted the execution of the promissory notes. But, he has flatly denied Ex.A3 memorandum of deposit of title deeds. The title deeds what were handed over by the defendant to the plaintiff on 30.6.1982 have been filed as Exs.A4 and A5. Ex.A3 document bears the signature of the defendant, which is not disputed by him. The defendant is unable to say how and under what circumstance he handed over the title deeds pertaining to his property to the plaintiff. The plaintiff's custody of those title deeds coupled with the execution of Ex.A3 memorandum of deposit of title deeds on the date of borrowal viz. 1.7.1982 would clearly demonstrate that the defendant who has executed a mortgage by deposit of title deeds, came forward with a false plea that he did not execute such mortgage, but it was a false and fraudulent one. Hence, the said plea has to be rejected as false.

8. The second contention that was put forth by the defendant before the Court below and equally here also was the plea of discharge of the entire principal and interest accrued thereon. According to the defendant, he has paid the following amounts to the plaintiff towards the loan amounts, which he availed from the plaintiff.

Rs.

1. 8.9.1982 1,200
2. 13.10.1982 1,200
3. 11.11.1982 3,600
4. 14.2.1983 1,000
5. 27.2.1983 1,400
6. 1.7.1983 1,200
7. 22.8.1983 6,000
8. 29.9.1983 10,000
9. 19.10.1983 4,000
10. 21.11.1983 3,200
11. 1.1.1984 7,000
12. Interest deducted at the time of advancing 3,600

It was contended by the respondents' side that those amounts were paid in cash on the respective dates directly by the defendant to the plaintiff; that the plaintiff assured that the relevant entries would be made in his accounts; that in order to make the said payments, he has borrowed moneys from D.W.2 Shanmugam, D.W.4 Balanavaneetham and D.W.5 Ramachandran by executing promissory notes. It was further added that the evidence of the defendant, who was examined as D.W.1 coupled with the evidence of the other witnesses would be pointing to the payments made by the defendant to the plaintiff. Much reliance was placed by the defendant on Ex.B10 document calling it as books of account, and he would contend that all would go to show the discharge of the entire loan, and hence, the lower Court was perfectly correct in holding that the plea of discharge was proved by the first respondent/defendant. After careful consideration of the entire materials on hand, the Court has to necessarily disagree with the defendant raising the plea of discharge. As stated above, the money transactions between the plaintiff and the defendant that took place on 1.7.1982 and on 8.7.1982 were covered by Exs.A1 and A2 promissory notes and Ex.A3 memorandum of deposit of title deeds under which the title deeds of the defendant's immovable property were deposited as a security. It is an admitted position that the defendant had no other money transactions with the appellant/plaintiff. Though it was

contended by the defendant that from 8.9.1982 to 1.1.1984 11 payments were made on different dates, it would be highly improbable and unbelievable that the defendant has parted with those amounts without getting any receipt therefor or making any endorsement either on the promissory notes or on the memorandum of deposit of title deeds, in that regard. The witnesses examined on the side of the defendant have spoken about the moneys advanced to the defendant, from which it cannot be inferred that the amounts borrowed from those witnesses were paid to the plaintiff. That apart, it is quite evident from the testimonies of D.Ws.2, 4 and 5 that they were interested in the defendant. The broker who arranged for the said loan was examined by the defendant as D.W.2, who has categorically spoken that at the time of part payments towards the loan, the usual practice was to get receipts then and there; and that at the time of lending money, there was no agreement between the parties that no receipt would be passed on by the plaintiff when part payments were made by the defendant. After careful scrutiny of Ex.B10, the Court is of the considered view that Ex.B10 document cannot be attached with any evidentiary value for more reasons than one.

9. Section 34 of The Indian Evidence Act reads thus:

"S.34. Entries in the books of account, including those maintained in an electronic form regularly kept in the course of business, are relevant whenever they refer to a matter into which the Court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability."

From the reading of the above provision, it would be clear (i) that the entries in the books of account would be relevant, and hence admissible when they refer to a matter into which the Court has to investigate if the said book account is regularly kept in the course of business; and (ii) that though such entries are admissible, it would not alone be sufficient to charge a person with a liability unless the entries are corroborated by other evidence. No doubt, the words " regularly kept" employed in the above provision of the Act would mean that the accounts can be according to a certain method or system or in some customary form and are not synonymous with "correctly kept". It does not necessarily mean that the said account should be kept in a technically correct manner. Even the roughest memorandum of accounts kept by shopkeepers are admissible if they are authentic.

10. Needless to say that a 'book' signifies a collection of sheets of paper bound together in a manner which cannot be disturbed or altered except by tearing apart. It would imply a collective entry of sheets even at the time the entries were made. It is true that no particular form is prescribed for an account book to be maintained, but it should be regular and usual account book as explains by itself. In the instant case, Ex.B10 was not a book of account, nor was it regularly kept in the course of business of the defendant. The defendant himself has well admitted that Ex.B10 originally consisted of loose sheets of paper, and they were put together and stitched, and it contains writings both in ink and in pencil. Even according to the defendant, Ex.B10 document contains only the entries relating to the payments made to the plaintiff on different dates. Hence, Ex.B10 can neither be termed as a book of account nor be treated as one regularly kept in the course of business of the defendant. The Court may hasten to say that Ex.B10 document is neither relevant nor admissible in evidence, since it was a self-serving one created to suit the plea of the defendant. Thus, the defendant has failed

to prove the discharge what he pleaded in the written statement.
11. The Court is able to notice a few circumstances which are against the said plea of discharge raised by the defendant. The suit mortgage transaction was entered into between the parties on 1.7.1982. The specific case of the plaintiff was that no amount was paid either towards the principal or the interest accrued thereon. According to the defendant, different payments numbering 11 were made from 8.9.1982 to 1.1.1984, and the entire debts were discharged by the last payment made on 1.1.1984. The instant suit was filed by the plaintiff on 1.4.1986. If it is true that the defendant had discharged the entire debts, as contended by him even on 1.1.1984, he would have, no doubt, demanded the return of original deeds of title from the plaintiff. At the time of filing of the suit, the plaintiff has filed Ex.A3 memorandum of deposit of title deeds along with all the documents given to him at the time of execution of Ex.A3. The defendant is unable to tender any explanation why the title deeds pertaining to his property were allowed to be in the custody of the plaintiff, despite the discharge of the loan even in January 1984.
12. The plaintiff has filed number of letters written by the defendant to him, which were marked as Exs.A16 to Ex.A20. The defendant has categorically admitted that he wrote all those letters to the plaintiff. It is pertinent to note that those letters were written to the plaintiff between the period from 6.4.1985 and 20.1.1986. A perusal of all these letters admittedly written by the defendant, would clearly indicate that he has sought for time for payment of the dues under the loan transaction and has further made a request to the plaintiff not to resort to legal proceedings. As pointed out earlier, the defendant had no other money transactions with the plaintiff except the one in question, and hence, it would be quite clear that the loan transaction referred to in those documents was only in respect of the suit transaction. No doubt, the contents in those letters would clearly falsify the plea of discharge that with the last payment on 1.1.198 4, the entire debts were cleared. All the above would go to show that the plea of discharge put forth by the defendant was not proved, and hence, there was no factual or legal impediment for granting a decree in favour of the plaintiff. The Court below without proper appreciation of evidence both oral and documentary has erroneously accepted the plea of discharge put forth by the defendant, and hence, it has got to be set aside.
13. So far as the rate of interest is concerned, the learned Counsel appearing for the respondents would urge that the rate of interest claimed by the plaintiff at 36% per annum from the date of loans till realisation was excessive, exorbitant and usurious. Countering to the said contention, the learned Counsel for the appellant/plaintiff would submit that the loan was raised for the business of the defendant, and hence, there is nothing to interfere in the said rate of interest. Taking into consideration the facts and circumstances of the case, the Court is of the firm view that awarding interest at the rate of 12% from the date of respective loans till realisation would meet the ends of justice. Therefore, the judgment and decree of the Court below are liable to be set aside, and the appellant/plaintiff is entitled to get a decree in the above lines.
14. In the result, this appeal suit is allowed, setting aside the judgment and decree of the lower Court. A preliminary decree is granted in favour of the plaintiff in O.S.No.230/86. The principal amount shall carry

interest of 12% per annum from 1.7.1982 for Rs.15,000/- and from 8.7.1982 for Rs.15,000 both till realisation. Costs throughout is ordered. Two months' time is granted for payment.

Index: yes
Internet: yes

To:
1. The II Additional Subordinate Judge,
Coimbatore.

2. The Record Keeper
V.R.Section
High Court
Madras.

nsv/

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